IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

---

**No. 40**

---

ELIZABETH ROSALIA WOODBY,

*Petitioner,*

v.

IMMIGRATION & NATURALIZATION SERVICE,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## REPLY BRIEF FOR THE PETITIONER

---

SIDNEY G. KUSWORM, SR.
JACOB A. MYERS
403 Keith Building
Dayton, Ohio
*Attorneys for Petitioner*

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 32

ELIZABETH ROSALIA WOODBY,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER


Sidney C. Newman, Jr.
Jacob A. Myers
602 Ezra Building
Dayton, Ohio
Attorneys for Petitioner

## INDEX


| | PAGE |
|---|---|
| Argument | 1 |
| I. Were the Decisions of the Board of Immigration Appeals and Also of the Special Inquiry Officer Supported by "Reasonable, Substantial and Probative Evidence on the Record Considered as a Whole"; and Parenthetically What Does "Reasonable, Substantial and Probative" Mean? | 1 |
| II. Did the United States Court of Appeals for the Sixth Circuit Commit Error by Not Returning the Case to the Immigration Service to Adduce Additional Evidence as Provided in 5 U.S.C. 1037-c? | 7, 8 |
| Conclusion | 8 |


### Citations

*Cases:*


| | |
|---|---|
| Matter of M, 7 I & N Dec. 251 | 3 |
| Miller v. Kruggel, 165 Kan. 435, 195 P.2d 597 (1948) | 2 |
| Nikashima v. Atcheson, 98 F.S. 11 | 6 |
| Nishikawa v. Dulles, 356 U.S. 129 (1959) | 3 |
| Schioler v. United States, 75 F.S. 353 | 6 |


*Statutes:*


| | |
|---|---|
| 8 U.S.C. 1182 (a) (12) | 5 |
| 8 U.S.C. 1182 (h) | 7 |
| 8 U.S.C. 1255 | 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

---

No. 40

---

ELIZABETH ROSALIA WOODBY,

*Petitioner,*

v.

IMMIGRATION & NATURALIZATION SERVICE,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## REPLY BRIEF FOR THE PETITIONER

---

### ARGUMENT

**I. WERE THE DECISIONS OF THE BOARD OF IMMIGRATION APPEALS AND ALSO OF THE SPECIAL INQUIRY OFFICER SUPPORTED BY "REASONABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE"; AND PARENTHETICALLY WHAT DOES "REASONABLE, SUBSTANTIAL AND PROBATIVE MEAN? MUST THE GOVERNMENT PROVE THE FACTS ON WHICH THE DEPORTABILITY OF THE ALIEN DEPENDS, BY A MERE PREPONDERANCE OF THE EVIDENCE, OR DOES IT HAVE A GREATER BURDEN?**

The burden of proof in this as in other deportation cases, rests upon the Government to prove the facts which relate

to the deportability of an alien. (See Footnote 9, Brief for the Respondent, *Sherman* v. *Immigration and Naturalization Service*, No. 80, October Term, 1966, in which the Respondent stated "Although the statute is silent on the point, it is undisputed that the burden of proving deportability is on the Government.") The Petitioner in this case has set up certain salient facts which proved that she was acting under duress for approximately a two month period of time during which time the alleged prostitution took place. The Special Inquiry Officer and the Board of Immigration Appeals found, that even if the Petitioner were acting under duress, for this two month period of time, that she still engaged in acts of prostitution after the duress had ended. The Petitioner does not argue that the duress continued beyond approximately June 1, 1957, but rather that she did not engage in any acts of prostitution after that date. The Immigration and Naturalization Service, having accepted the argument that the Petitioner was acting under duress for the two month period of time ending approximately June 1, 1957, the necessary or required burden of proof is upon the Immigration and Naturalization Service to prove that the Petitioner did, in fact, engage in acts of prostitution after June 1, 1957. The Respondent has the burden of proving the positive fact that the Petitioner did voluntarily engage in acts of prostitution after the date in question.

In the Case of *Miller* v. *Kruggel*, 165 Kan. 435, 195 P. 2d. 597, 599 (1948), the Court stated:

> "It has sometimes been said that when a party to an action has made a prima facie case the 'burden of proceeding' or the 'burden of evidence' then shifts to his adversary. This is simply a way of saying that upon a prima facie case, a litigant is entitled to prevail if this adversary offers no evidence. The necessity of offering evidence to offset an adversary's prima

facie case in no way shifts the burden of proof, which continues to rest upon the party which has it."

The burden of proof in this case is upon the Respondent. If the Petitioner voluntarily engaged in acts of prostitution, then she is subject to deportation. If, on the other hand, the acts of having engaged in prostitution were involuntary, and under duress, then the Petitioner has not exercised her free will, and she is therefore not subject to deportation. See *Matter of M.*, 7 I & N Dec. 251. In the case of *Nishikawa* v. *Dulles*, 356 U.S. 129 (1959) this Court in a expatriation case where the defense of duress was being used by the Petitioner, held that the burden was upon the Government to prove that there was no duress at the time of the alleged expatriation, and that the act showing renunciation of citizenship was voluntarily performed. Compare this case with Footnote 4 on Page 16 of the *Amica Curiae* Brief field in the case of *Sherman* v. *Immigration and Naturalization Service*, No. 80 October Term 1966.

Once it has been established that the burden is upon the Respondent, the next determination that must be made, is; what burden or degree of persuasion must it bear? May this Court determine that the required proof is by "clear and convincing" proof; or by proof "beyond a reasonable doubt"? The Respondent contends that neither the standard "clear and convincing," nor the standard "beyond a reasonable doubt" are appropriate, because the statute (8 USC 1105 a(4)) provides the standard to be "reasonable, substantial and probative evidence." When examining these terms closely, we find that they are mutually exclusive. The standard "reasonable, substantial and probative" refers to the quality of the evidence presented (See *Chow Sing* v. *Brownell*, 235 F. 2d 602 at 604, 1956), while the standards "clear and convincing" and "beyond a reasonable

doubt" refer to the burden of Proof, and not to the quality of the evidence. The Respondent concedes that the statute is silent as to the burden of proving deportability. (See Footnote 9, Brief for the Respondent, *Sherman* v. *Immigration & Naturalization Service*, No. 80, October Term, 1966.) It is therefore appropriate to note that Congress, by speaking as to the quality of the evidence required, has not spoken as to the burden of proof required and therefore it is singularly up to this Court to determine what degree of burden of proof is to be required in this type of proceeding, i.e., by "clear and convincing" proof, or proof "beyond a reasonable doubt."

Since "reasonable, substantial and probative" refers to the quality of the evidence produced, this phrase is obviously intended to refer to the standard to be used on review to determine if the special inquiry officer used the correct burden of persuasion, i.e., proof "beyond a reasonable doubt" or by "clear and convincing" proof, when making his finding. His finding would be sustained if the quality of the evidence reviewed (reasonable, substantial and probative) was such that when the special inquiry officer weighed the evidence, he used the correct burden of persuasion, and there was sufficient evidence to support his finding.

In order for the Petitioner to be found deportable, it is necessary for the Court to find that she engaged in the criminal act of practicing prostitution. A finding of her having engaged in such a criminal act would necessarily carry along with it deportation, a grave consequence of taking this mother from her two minor children, and further carrying with it the stigma of a criminal act.

The impact of the decision concerning the engagement in acts of prostitution by the Petitioner is so closely akin to a criminal finding that the criminal standard should be applied. She would have the stigma of having been found

by a Court to be a prostitute. There is certainly no more stigma by having the Municipal Court of Dayton, Ohio find that the Petitioner engaged in acts of prostitution in a criminal case, than by having the Supreme Court of the United States find that the Petitioner engaged in acts of prostitution, in this case, because she still would be subject to deportation under the same section of the Code, whether convicted or not (8 U.S.C. 1182 (a) (12).) (See page 21, Brief for the Respondent, *Sherman* v. *Immigration and Naturalization Service*, No. 80, October Term, 1966.) The children of the Petitioner would also have the stigma of their mother having been found to be a prostitute. With this factual situation with these grave consequences involved, and with these stigmas present, the appropriate standard of proof that should have been used is proof "beyond a reasonable doubt" or at least "clear and convincing" proof, and not, proof by a "preponderance of the evidence."

There is a certain amount of confusion present in the testimony of the Petitioner and the witnesses. This confusion relates to time rather than to events. The Petitioner contends that she terminated her arrangement with Mr. Wally at the time the $300.00 was repaid to him (R. 23). The Respondent is attempting to show that the Petitioner engaged in prostitution after the $300.00 was repaid. It is clear that the Petitioner met Mr. Amicon after she terminated her arrangement with Mr. Wally (R. 23 and 24).

> Q. Why did you terminate this arrangement with Mr. Wally? A. Because I had my $300.00.
>
> Q. These various other men you have named, Mr. Kincaid, Mr. Amicon, and Mr. Waddell, did you have relations with these men during the same period you were receiving men from Mr. Wally? A. No sir. I met Mr. Amicon and he was the one who made me realize what I was doing.

Q. These men previously named, did you meet them after you terminated your arrangement with Mr. Wally? A. Yes.

Q. All of them? A. Yes.

Q. Have you engaged in sexual relations with any other men since the termination of your arrangement with Mr. Wally? A. Not for payment.

Some confusion is added by some of the Petitioner's answers when she stated (R. 46): "I don't want to lie—I think it was another two weeks. See, I met Mr. Amicon. He asked me—told me what I was doing." This answer is explained by an answer to another question of the Petitioner (R. 24) when she stated:

Q. Are you now aware that the relations you had with men who were sent to you by Mr. Wally was prostitution? A. I did not recognize it as that.

Q. Do you know now? A. Now I know, yes.

The Petitioner did not at that time or until some time after realize that what she was doing was prostitution because she had been reduced to such a mental state that her sole thought was to attempt to save the life of her child. See *Schioler* v. *United States*, 75 F.S. 353. *Nikashima* v. *Atcheson*, 98 F. S. 11.

The Petitioner, by her answer, was not stating that she had engaged in prostitution until she met Mr. Amicon, but rather that Mr. Amicon was the one who explained to her and made her realize what she had been doing. The respondent is attempting to infer from this that the Petitioner continued to engage in acts of prostitution until the time she met Mr. Amicon. This fact is refuted by Mr. Amicon's testimony (R. 7) when he was asked:

Q. . . . do you know why she continued practicing until she started her relationship with you? A. You would have to ask her. I don't believe she was in it continuously.

There was no showing in the Respondent's case that the Petitioner engaged in acts of prostitution between June 1, 1957 and the time when she met Mr. Amicon. The only testimony in the record relating to the Petitioner's engagement in prostitution at the time she met Mr. Amicon are bits of testimony which reflect the confusion that surrounded the entire hearing. Much of the testimony that is referred to by the respondent refers to the prior statement made by the Petitioner which she repudiated.

It is true that the Petitioner possibly cannot be considered a long time resident alien, for she has only been in this country for approximately twelve (12) years. She does, however, have two minor children who are American citizens, and which children she does visit. It was not until approximately December, 1965, when the Petitioner was able to obtain visitation rights with her own children, the custody of whom was granted to the grandparents by the Harlan County, Kentucky Circuit Court. The Petitioner therefore does have certain family ties here in this country, which in the eyes of a mother, make it as important for her to stay here as life itself. These facts certainly make a higher standard than by a "preponderance of the evidence" appropriate.

It is interesting to note that the Respondents has referred to the fact that the Petitioner has not availed herself of the discretionary relief authorized under Sections 212 (h) and 245 of the Act. (8 U.S.C. 1182 (h) and 1255.) These sections that authorize discretionary relief are apparently not open to the petitioner if she is found to have engaged in prostitution after entry, which findings would therefore directly relate to her good moral character.

## II. DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMIT ERROR BY NOT RETURNING THIS CASE TO THE UNITED STATES DEPARTMENT OF JUSTICE, DIVISION OF IMMIGRATION SERVICE TO ADDUCE ADDI-

**TIONAL EVIDENCE AS REQUESTED IN THE PRAYER FOR RELIEF IN THE BRIEF FILED BY THE PETITIONER IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THIS CAUSE.**

It seems that in the interest of justice, the Immigration and Naturalization Service would be interested in finding out exactly when the duress in this case did cease; that they would be interested in finding out exactly when the Petitioner's alleged prostitution ceased. They brought in no witnesses other than the Petitioner who admitted what she did and told why she did it. Since the Petitioner was found to have committed acts of prostitution after the duress had ceased, she desired to bring in evidence to show that she did not engage in acts of prostitution after that date. The Respondent now claims that this would serve no purpose. Its only purpose would be to show what really happened and when it happened.

Possibly there was not a technical compliance with the statute before the Court of Appeals for the Sixth Circuit but that Court was requested in the briefs of the Petitioner to permit a remand of the case to the Department of Justice so that this time sequence, which appears to be a major portion of this case, could be straightened out.

## CONCLUSION

The Judgement of the Court of Appeals should be reversed.

Respectfully submitted,

SIDNEY G. KUSWORM, SR.
JACOB A. MYERS
408 Keith Building
Dayton, Ohio
*Attorneys for Petitioner*